

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JOAN M. JOJOLA, et al.,

Plaintiff(s),

v.

AMERICAN PACIFIC CORPORATION, et al.,

Defendant(s).

Case No. 2:14-CV-1492 JCM (GWF)

ORDER

Presently before the court is defendants', American Pacific Corporation (hereinafter "AMPAC") and Julie Buckman (collectively "defendants"), motion to dismiss. (Doc. # 2).

Joan Jojola, Eleanor Barcelon, Jayann Jackson, and Cathryn Lum (collectively "plaintiffs") filed a response, (doc. # 7), and defendants filed a reply, (doc. # 9).

I. Background

This is a Title VII employment discrimination action. Plaintiffs are four former employees of AMPAC. Plaintiffs allege a series of discriminatory conduct against them based on their gender, race, color, and religion. Plaintiffs also allege state law claims of intentional infliction of emotional distress and unjust enrichment.

Buckman is a female employee of AMPAC. Buckman held the position of controller and it appears that she had some supervisory power over plaintiffs. Plaintiffs suggest that Buckman was the supervisor. However, defendants allege that Buckman was not plaintiffs' direct supervisor. Plaintiffs believe that Buckman discriminates against female employees because she is sarcastic and demeaning to females and more pleasant with males. They also allege that Buckman discriminates against Native Americans and Catholics. Plaintiffs base their complaint on the following allegations.

1 Jojola is a woman of Native American descent. (Doc. # 1-1). Jojola began working at
 2 AMPAC in June of 2008 as a receptionist/administrative specialist. Jojola felt that Buckman
 3 “displayed hostility and discrimination” towards her because of her race, religion, and gender.
 4 (Doc. # 1-1). Jojola resigned on July 26, 2013.

5 Barcelon is a woman who began working at AMPAC in June of 2008 as an accounts
 6 payable supervisor. Barcelon once was denied vacation leave by Buckman and alleges that she
 7 was entitled to it. (Doc. # 1-1). Barcelon alleges that Buckman had no legitimate reason for
 8 denying her leave.

9 Jackson is also a woman who was hired as a payable clerk on April 1, 2009. Jackson was
 10 once asked to move to a different work area because Buckman was allegedly pitting Jackson and
 11 Lum against one another. Jackson resigned on August 12, 2013.

12 Lum is a woman who was allegedly the victim of bullying and intimidation by Buckman.
 13 There are no facts discussing whether Lum also resigned or whether she still works for AMPAC.
 14 Since the complaint states that it is an employment discrimination case brought by four former
 15 employees of AMPAC, it appears that Lum is no longer employed by AMPAC. (Doc. # 1-1 line
 16 1). However, there is no other information addressing whether Lum resigned, was fired, or still
 17 works for AMPAC.

18 **II. Legal Standard**

19 A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which relief
 20 can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide “[a] short
 21 and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.
 22 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not
 23 require detailed factual allegations, it demands “more than labels and conclusions” or a
 24 “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 25 (2009) (citation omitted).

26 “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550
 27 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual
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1 matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (citation
2 omitted).

3 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply
4 when considering motions to dismiss. First, the court must accept as true all well-pled factual
5 allegations in the complaint; however, legal conclusions are not entitled to the assumption of
6 truth. *Id.* at 678-79. Mere recitals of the elements of a cause of action, supported only by
7 conclusory statements, do not suffice. *Id.*

8 Second, the court must consider whether the factual allegations in the complaint allege a
9 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s complaint
10 alleges facts that allow the court to draw a reasonable inference that the defendant is liable for
11 the alleged misconduct. *Id.* at 678.

12 Where the complaint does not permit the court to infer more than the mere possibility of
13 misconduct, the complaint has “alleged – but it has not shown – that the pleader is entitled to
14 relief.” *Id.* at 679 (internal quotations omitted). When the allegations in a complaint have not
15 crossed the line from conceivable to plausible, plaintiff’s claim must be dismissed. *Twombly*,
16 550 U.S. at 570.

17 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d
18 1202, 1216 (9th Cir. 2011). The *Starr* court stated,
19 First, to be entitled to the presumption of truth, allegations in a complaint or
20 counterclaim may not simply recite the elements of a cause of action, but must
21 contain sufficient allegations of underlying facts to give fair notice and to enable
22 the opposing party to defend itself effectively. Second, the factual allegations that
23 are taken as true must plausibly suggest an entitlement to relief, such that it is not
24 unfair to require the opposing party to be subjected to the expense of discovery
25 and continued litigation.
26 *Id.*

23 **III. Discussion**

24 A properly pled complaint must provide “[a] short and plain statement of the claim
25 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v.*
26 *Twombly*, 550 U.S. 544, 555 (2007). Plaintiffs are not entitled to relief based on something they
27 observed happen to other people. Plaintiffs’ complaint has a number of allegations that the court
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1 will not consider. Any of the allegations concerning what plaintiffs “observed” or “noticed”
 2 Buckman do to other employees will not be considered for the purpose of the present motion.

3 There is also an allegation in the complaint discussing a “Ms. Leslie,” “LVMPD,” and
 4 “LMVLP.” (Doc. # 1-1 line 59). The court does not know who these parties are or how they are
 5 connected to the instant complaint. “Ms. Leslie” is referred to again in the complaint where
 6 plaintiff states that “Ms. Leslie” is entitled to attorneys’ fees and costs. (Doc. # 1-1 line 74).
 7 The court believes this to be a mistake and thus will not consider these allegations.

8 The court will consider the remaining allegations below.

9 *A. Employment discrimination*

10 To establish a prima facie case for discrimination, a plaintiff must allege that (1) she is a
 11 member of a protected class; (2) she was qualified for her position; (3) she experienced an
 12 adverse employment action; and (4) similarly situated individuals outside her protected class
 13 were treated more favorably. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

14 Since plaintiffs did not allege that they suffered an adverse employment action, they must
 15 establish that they were constructively discharged. To establish a claim for constructive
 16 discharge, a plaintiff must plead that “a reasonable person in [her] position would have felt that
 17 [she] was forced to quit because of intolerable and discriminatory working conditions.” *Hardage*
 18 *v. CBS Broad. Inc.*, 427 F.3d 1177, 1184 (9th Cir. 2005).

19 *a. Race*

20 The first cause of action is by Jojola against AMPAC and Buckman for employment
 21 discrimination based on race.

22 Jojola alleges that AMPAC has maintained a consistent pattern and practice of racial
 23 discrimination against minority employees, particularly employees of Native American descent.
 24 Buckman allegedly stated in Jojola’s presence how “rude” Native Americans are. On another
 25 occasion, Jojola allegedly overheard Buckman say, “Native Americans, Indians, I don’t care,
 26 whatever they want to call themselves.”

27 The court does not find that two comments, overheard by Jojola, create a consistent
 28 pattern and practice of racial discrimination against employees of Native American descent.

1 Further, merely overhearing an offensive comment does not establish a prima facie case of
2 discrimination.

3 The court finds that Jojola's allegations concerning employment discrimination based on
4 race do not rise above the speculative level necessary to survive a 12(b)(6) motion to dismiss.
5 The allegations do not plausibly suggest an entitlement to relief. Accordingly, the claim for
6 employment discrimination based on race is dismissed.

7 *b. Religion*

8 The second cause of action is by Jojola against AMPAC and Buckman for employment
9 discrimination based on religion.

10 Jojola alleges that on one occasion, while in the break room watching a news program
11 about the new Pope, Buckman stated audibly negative views about the pope and the Catholic
12 religion. A difference of opinion, based on religion, does not create a claim for discrimination.

13 The court finds that the allegations concerning employment discrimination based on
14 religion do not rise above the speculative level necessary to survive a 12(b)(6) motion to dismiss.
15 The allegations do not plausibly suggest an entitlement to relief. Accordingly, Jojola's claim for
16 employment discrimination based on religion is dismissed.

17 *c. Gender*

18 The third cause of action is by all plaintiffs against AMPAC and Buckman for
19 employment discrimination based on gender.

20 Plaintiffs allege that Buckman was harder on female employees than male employees.
21 As evidence, plaintiffs offer that they observed Buckman use sarcasm and a hostile tone when
22 addressing female employees. Plaintiffs further allege that Buckman made personal and
23 inappropriate comments to female employees. However, plaintiffs fail to give any details
24 concerning what specifically Buckman said or did to them personally that was discriminatory or
25 that created a hostile work environment.

26 The court finds that the allegations concerning employment discrimination based on
27 gender do not rise above the speculative level necessary to survive a 12(b)(6) motion to dismiss.
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1 The allegations do not plausibly suggest an entitlement to relief. Accordingly, the claim for
2 employment discrimination based on gender is dismissed.

3 *B. Intentional infliction of emotional distress*

4 All plaintiffs assert the claim for intentional infliction of emotional distress against
5 Buckman. To establish a claim for intentional infliction of emotional distress, a plaintiff must
6 allege (1) extreme and outrageous conduct with either the intention of, or reckless disregard for,
7 causing emotional distress, (2) the plaintiff suffered severe or extreme emotional distress and (3)
8 actual or proximate causation. *Star v. Rabello*, 97 Nev. 124, 125 (1981).

9 Plaintiffs' intentional infliction of emotional distress claims are based on Buckman's
10 allegedly discriminatory actions. Plaintiffs claim that by "making unsolicited hostile and
11 sarcastic remarks, Buckman engaged in conduct that was outrageous in character and extreme in
12 degree." (Doc. # 1-1). However, a discrimination claim does not create a claim for intentional
13 infliction of emotional distress. Plaintiffs fail to show that the alleged discriminatory conduct
14 was extreme and outrageous. Further, plaintiffs did not show that they suffered severe or
15 extreme emotional distress.

16 The court finds that the intentional infliction of emotional distress allegations do not rise
17 above the speculative level necessary to survive a 12(b)(6) motion to dismiss. The allegations do
18 not plausibly suggest an entitlement to relief. Accordingly, the claim for intentional infliction of
19 emotional distress is dismissed.

20 *C. Unjust enrichment*

21 The final claim is by Jojola, Jackson, and Lum against AMPAC for unjust enrichment.
22 To establish a claim for unjust enrichment, a plaintiff must allege that a defendant has and retains
23 a benefit which in equity and good conscience belongs to the plaintiff. *Coury v. Robinson*, 115
24 Nev. 84, 90 (1999).

25 Plaintiffs have alleged that Buckman required Lum, Jackson, and, "on information and
26 belief," Jojola "to work uncompensated hours in order to make deadlines and quotas. . ." (Doc. #
27 1-1). This single conclusory allegation is the only allegation regarding unjust enrichment. It
28 does not show that defendant has and retains a benefit which in equity and good conscience

1 belongs to the plaintiffs. Plaintiffs have failed to allege facts concerning what wages they
2 believe they are entitled to or when the hours were allegedly worked.

3 The court finds that the allegation concerning unjust enrichment does not rise above the
4 speculative level necessary to survive a 12(b)(6) motion to dismiss. The allegations do not
5 plausibly suggest an entitlement to relief. Therefore, the claim for unjust enrichment is
6 dismissed.

7 Accordingly,

8 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants' motion to
9 dismiss, (doc. # 2), be, and the same hereby is, GRANTED. Plaintiffs' complaint is, hereby,
10 dismissed without prejudice.

11 The clerk shall enter judgment accordingly and close the case.

12 DATED November 18, 2014.

13 
14 UNITED STATES DISTRICT JUDGE